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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 503

WILLIAM Z. FOSTER, EUGENE DENNIS, also known as Francis K. Waldron, Jr., JOHN B. WILLIAMSON, JACOB STACHEL, ROBERT G. THOMPSON, BENJAMIN J. DAVIS, JR., HENRY WINSTON, JOHN GATES, also known as Israel Regenstreif, IRVING POTASH, GILBERT GREEN, CARL WINTER, and GUS HALL, also known as Arno Gust Halberg,

Petitioners,

against

HONORABLE HAROLD R. MEDINA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND STAY

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit denying a writ of mandamus sought by petitioners to direct the disqualification of a district judge, scheduled to sit in their criminal trials, who had stricken their affidavit charging him with personal bias and prejudice. Petitioners further pray that the Court because of the urgency of this petition give immediate consideration thereto and stay any further proceedings, particularly the trials of petitioners now set for January 17, 1949, pending the Court's determination of this petition.

Opinion Below

The opinion of the Court of Appeals is as yet unreported. It appears in the record * at pp. .

Statement of the Matter Involved

Petitioners are defendants in actions now pending before the District Court for the Southern District of New York for alleged violation of the Act of June 28, 1940, 54 Stat. 670, 18 U. S. C. (1940 ed.) §§ 10, 11 and 13, now 18 U. S. C. § 2385. The trials on the indictments are now set for January 17, 1949. One indictment charges all the petitioners with a conspiracy to organize the Communist Party of the United States, a group allegedly advocating the overthrow of the Government by force and violence. Other indictments charge petitioners individually with being members of the Communist Party of the United States. Defendants have pleaded not guilty to the indictments.

The affidavit of personal bias and prejudice was filed after the following occurrences:

On August 16, 1948, Mr. Abraham Unger, attorney for the petitioners, and Mr. John F. X. McGohey, United States Attorney, appeared before District Judge Harold R. Medina, then sitting in the motion part of the Court, on petitioners' request for an enlargement of time for preliminary motions. In the course of argument, colloquy ensued between the District Judge and counsel, of which the following extracts were set forth in the affidavit (R.):

> "The Court: What you challenge is the constitutionality of the statute under which the indictment is drawn?
>
> "Mr. Unger: Of course, to that indictment as drawn and implied and interpreted.

* Hereafter abbreviated as "R."

"The Court: It seems to me it is a question of law. I do not see what you need 90 days for to get up the law on the thing. From what you say I do not think you would need anywhere near so much time.

"Mr. Unger: I should imagine, if your Honor pleases, or I would say that the issue may seem to be utterly clear to me and yet I would be immodest if I were to say that the question is not a difficult and complex one. It is especially difficult and complex in the period in which the application is made. I think it therefore requires——

"The Court: Of course, if the difficulty and complexity has to do with this idea of overthrowing the Government by force I should think that public policy might require that the matter be given prompt attention and not just held off indefinitely when perhaps there may be some more of these fellows up to that sort of thing.

* * * * * *

"Mr. McGohey: Now, if the statute is unconstitutional and the Circuit Court in the Middle West had said that it is, and if it be a fact that these men have done what the indictment charges them with doing they ought not to be permitted to continue to carry on those activities if that constitutes a crime.

"Now, I am not unaware either that this does go to the question of the First Amendment; that it involves the right of political opinion; that it involves the right of speech, the freedom of speech, but then again it involves the use of that right of freedom of speech which goes to the very existence of the Government itself, so we can agree that it is important. It is important from the standpoint of the defendants but it is equally as important, we know, from the standpoint of the Government of the United States and important from the standpoint of all of the citizens of the United States.

"The Court: And if you were to let them do that sort of thing, why, it would destroy the Government.

"Mr. McGohey: Precisely.

"The Court: And they argue that under the Constitution you can't prevent people from banding together to overthrow the Government by force and violence, is that it?

"Mr. McGohey: I do not know if they go quite that far, your Honor, but they go so far as to say that the teachings and principles of this party, which we contend do advocate and urge the overthrow of the Government of the United States, they say do not, and that the teachings and principles which they advocate are quite permissible within the provisions of the First Amendment. Consideration has to be given, I take it, as to what they teach, and I think we are going to have to allow the jury to determine that.

"The Court: I should think there is a big difference, a very perceptible difference.

"Mr. McGohey: The point is as to what they claim and what they are doing.

"The Court: For example, not involving weasel words that they used and if you interpret them to mean the overthrow of the Government by violence, and they say they do not, but isn't there just some play on words there?

"Mr. McGohey: Apparently that is so. I have not heard what the defense is in this case, but that is what the defense was in the Dunne case.

"The Court: I am not going to give them anything like 90 days, I am going to tell you right now.

* * * * * * *

"Mr. Unger: No, no, if your Honor pleases. I listened with great attention and respect to your Honor's remarks, and I have made this statement:

"I said there is not a word in the indictment—let me repeat that—there is not a word in the indictment alleging any acts committed by the defendants any of them, or by the Communist Party, in the course of the three years listed in this indictment from 1945 to date, or in the course of the 27 years of the previous existence of the Communist Party, alleging any acts of force or violence, or acts of the overthrow of the Government. I repeat that, if your Honor pleases.

"The Court: No, they want to wait until they get everything set and then the acts will come."

In the course of a subsequent hearing on November 1, 1948, Judge Medina announced that he would be the trial judge (R.). Petitioners thereupon filed an affidavit

of personal bias and prejudice pursuant to Section 144 of Title 28 of the U. S. Code, Act of June 25, 1948, c. 646, 62 Stat. , and sought his disqualification (R.). The affidavit recited the extracts from the colloquy here set forth, and charged that the Judge's statements established his belief, not only that petitioners were guilty of the charges made in the indictments, but that, in the absence of charge and evidence, he already believed that defendants "want to wait until they get everything set" and then commit acts designed to bring about the destruction of the Government by force and violence.

Passing on the affidavit, Judge Medina held it insufficient on its face. He characterized his quoted statements as "observations by way of purely legal argument", corroborating this by reference to the entire colloquy and not merely to the quotations in the affidavit, denied any intention of expressing an opinion on petitioners' guilt or innocence, and disavowed any consciousness of bias.*

Petitioners thereupon sought, by mandamus in the Court of Appeals, to require Judge Medina's disqualification. The Court refused the writ, disregarded petitioners' apprehensions, and accepted in substance the view that the cited remarks were legal argument and did not lend fair support to the charge of bias. The blunt and positive remark of Judge Medina that "they want to wait until they get everything set and then the acts will come" was watered down by the Court of Appeals "in the light of the context in which it * * * (was) uttered," to a statement of the abstract theorem that "the crime of conspiracy is complete if the conspirators planned to have acts of violence follow after they got everything set" (R.).

Petitioners should not be required to stand trial before a District Judge whose prejudice against them seems plain, especially since the interpretations placed by the Court of Appeals on the judge's remarks will not bear analysis.

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* The opinion appears *infra*, pp. 8-9.

Jurisdiction

The judgment of the Court of Appeals was entered on November 12, 1948. The jurisdiction of this Court is invoked under Section 1254 of Title 28, United States Code, Act of June 25, 1948.

Statute Involved

Title 28, United States Code, Section 144, Act of June 25, 1948, c. 646, 62 Stat. provides:

> "Bias or Prejudice of Judge. Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit as to any judge. It shall be accompanied by a certificate of counsel of record that it is made in good faith."

Questions Presented

1. Did the Court of Appeals err in holding the affidavit of personal bias and prejudice insufficient?

2. Assuming that the reasons advanced for granting certiorari are sufficient, should the writ be granted now?

3. Should this Court stay any further proceedings, particularly the trials now set for January 17, 1949, pending its determination of this petition?

I. Reasons for Granting the Writ

There are two reasons for granting the writ:

A. The Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court.

B. The decision of the Court of Appeals is in conflict with the decisions of other Courts of Appeal on the same matter.

These reasons will be discussed in order.

A. *The decision of the Court of Appeals is in conflict with Berger* v. *U. S.*, *255 U. S. 22.*

1. The *Berger* Case

Section 144 of the Judicial Code (28 U. S. Code, Section 144) is based on 28 U. S. C., 1940 ed., Sec. 25 (Mar. 3, 1911, ch. 231, Sec. 21, 36 Stat. 1090). This provision, called the prejudice statute, was authoritatively interpreted by this Court in the *Berger* case. The Court there held that a trial judge lacks the authority to pass upon the truth of the allegations contained in an affidavit of prejudice, that if the affidavit satisfies the formal requirements of the statute and gives "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment" (255 U. S. 22, 33-34), the affidavit is legally sufficient and the judge must disqualify himself.

It is plain that in this case the Court of Appeals decided not the sufficiency of the affidavit, but the truth or falsity of the allegations contained therein. In fact, the manner in which this was done here is almost precisely the manner in which it was done in the *Berger* case.

As appears from the dissenting opinion of Mr. Justice Day in the *Berger* case, the remarks attributed to the District Judge by the affidavit in that case were inconsistent with a verified transcript of the proceedings in the course

of which the alleged remarks were made. The transcript had been introduced at the hearing before the District Judge on the affidavit of prejudice, and the District Judge had then found that the allegations in the affidavit were untrue (255 U. S. 22, 39-40). None the less, this Court held that the District Judge was bound by the allegations of the affidavit.

2. The Facts in This Case

Here the District Judge did almost exactly what the District Judge in the *Berger* case had done and which this Court found to be improper there. In this case, the affidavit quotes three portions of the colloquy (the literal accuracy of which is not denied) which took place during an argument before the District Judge on a motion by the defendants for an extension of time in which to make motions. The affidavit then alleges that the three quotations establish that the District Judge "has a personal bias and prejudice against each and every affiant herein and in favor of the adverse party" (R.).

For the convenience of the Court, we set forth the brief opinion of the District Judge:

> "The affidavit of bias or prejudice herein is stricken. It does not meet the requirements of 28 U. S. C. A. §144 and is insufficient on its face. The colloquy between the Court and counsel had to do with the importance and character of questions of law relating to the sufficiency of the indictment and the time to be allowed by way of continuance in order that counsel might adequately prepare for the presentation of his points in due course. This discussion was necessarily based upon the assumption that the facts as alleged in the indictment were true. The comments appearing in the excerpts contained in the affidavit show clearly on their face that they were intended and were in fact observations by way of purely legal argument; and this appears still more clearly in the entire colloquy which is hereby made a part of this opinion and is annexed hereto.

"There was no intention on my part to express any opinion whatsoever on the guilt or innocence of the defendants or any of them. I had given the case no consideration whatsoever prior to the time that the application for an enlargement of time within which to make motions came before me on the occasion referred to. I have not now nor have I ever had any thoughts or opinions relative to the facts of the case.

"Had I been conscious of any personal bias or prejudice against the defendants or any of them I would, without waiting for any suggestion by counsel or the filing of any affidavit, have disqualified myself when the case first came before me. I have never understood that discussion of the law applicable to a case formed a basis for recusation."

In the first of the three paragraphs of this opinion, the District Judge refers to *the entire colloquy* (and not merely to the three portions quoted in the affidavit) in support of his conclusion; in fact, he annexes the entire colloquy to his opinion. The statement at the beginning of the opinion that "the affidavit is insufficient on its face" is entirely vitiated by the reliance the District Judge then places on this material outside the affidavit.

The remaining two paragraphs of the opinion add force to our argument. The disclaimers in the second paragraph are in themselves statements of fact which go to the truth or falsity of the affidavit, and thus, under the *Berger* case, were irrelevant to a consideration of its legal sufficiency. As to the final paragraph of the opinion, all that needs saying, and we say it respectfully, is that it may be taken for granted that the District Judge would, as he states, have disqualified himself had he been conscious of any personal bias or prejudice against the defendants, and that there would be no necessity to provide by statute for the filing of affidavits of prejudice if judges were always conscious of prejudice for or against litigants before them.

The opinion of the Court of Appeals (R.) suffers from the same vices as that of the District Judge. The opinion entirely ignores the error committed by the Dis-

trict Judge in relying on the entire colloquy and not only on the portions quoted in the affidavit. The error committed by the Court of Appeals is shown most clearly in the part of the opinion dealing with the third excerpt from the colloquy, the one "upon which", says the Court of Appeals correctly, "the defendants place particular reliance" (R.). In explaining away the comment of the District Judge to the effect that the defendants "want to wait until they get everything set and then the acts will come," the Court generalizes that: "The fair meaning of any remark must be interpreted in the light of the context in which it is uttered" (R.). Taken in context, says the Court, this remark "was made in answer to counsel's argument that the indictment was insufficient because it did not allege that acts of violence had already been performed" (R.). *The fact is, that there is not a single word contained in counsel's argument on the basis of which it can be said that counsel was arguing that the indictment was insufficient.* (This statement of the Court of Appeals will also be found in the first paragraph of the District Judge's opinion, supra, p. 8). The part of counsel's argument quoted in the affidavit is too plain to be open to misinterpretation. Counsel was making only one statement of fact and one only—that the indictment alleges no acts of force or violence. It is impossible to say more than this about this part of counsel's argument which appears in the excerpt. The finding by the Court of Appeals, therefore, that the affidavit was insufficient is clearly not justified by the affidavit itself.

The Court of Appeals also erred as to the other two portions of the colloquy quoted in the affidavit. As to the first, involving the comment of the District Judge that, "I should think that public policy might require that the matter be given prompt attention and not just held off indefinitely when perhaps there might be some more of these fellows up to that sort of thing", the Court of Appeals interprets this as "merely an argument against granting a long extension lest during the delay persons other than

the defendants might commit the same offense as that charged against the defendants". The District Judge, says the Court of Appeals, was not commenting on the guilt of the defendants but on the possible guilt of "persons other than the defendants". But the District Judge said no such thing; he said "some more of these fellows" might be "up to that sort of thing". "More" means others *in addition* to the defendants, not others *exclusive* of the defendants. We submit that the District Judge was here assuming the guilt of the defendants.

In the same way, the District Judge assumed the guilt of the defendants in his comment in the second excerpt that "if you were to let them do that sort of thing, why, it would destroy the Government". The Court of Appeals states that this comment is conditioned by the United States Attorney's introductory assumption: "if it be a fact that these men have done what the indictment charges". Here also there is nothing in the affidavit to show that the comment of the District Judge was conditioned by this hypothesis. It is true that at the outset of his quoted remarks the United States Attorney indulged in the quoted hypothesis. But it is also true that there is nothing to show that the District Judge based his comment on the hypothesis; if anything, the quoted excerpt demonstrates that the comment of the District Judge was entirely gratuitous. Is it not a fairer conclusion that if the District Judge intended his comment to be based on the hypothesis he would have stated the hypothesis, as one would normally do, especially when the comment did not follow immediately upon the statement of the hypothesis by the United States Attorney?

The manner in which the opinion of the Court of Appeals explains away these two comments of the District Judge would in itself be sufficient for the affiants to complain that they are being deprived of the availability to them of the prejudice statute. Even if the petitioners were to concede that either of the two comments might be explained away, they would still contend that both of them,

taken with the third, all made on the same occasion, evidenced a clear predetermination of their guilt. The palpable misconstruction by the Court of Appeals of all three comments was the basis on which that Court found that the affidavit was insufficient under the *Berger* case. The Court's plain departure from the *Berger* case calls for the assumption of jurisdiction by this Court.

3. The *Berger* Case in the Lower Federal Courts

This Court has had no occasion since the *Berger* case to interpret or construe the prejudice statute. This case, in which, like in the *Berger* case, leading members and officers of a political minority under severe attack by the Government are charged with a crime essentially political in content, like in the *Berger* case, offers a most appropriate occasion for a review of lower court decisions applying the statute and this Court's decision in the *Berger* case.

There is little doubt of the correctness of the conclusions reached in a recent study that:

> "• • • the clear Berger decision, the clear statute, and its clear legislative history have not been followed in practice, and federal trial practice still does not provide a litigant with the automatic change of venue to which he is apparently entitled upon filing an affidavit in good faith" (John P. Frank, "Disqualification of Judges" (1947), 56 Yale Law Journal 605, 629).

The author goes on to say:

> "Frequent escape from the statute has been effected through narrow construction of the phrase 'bias and prejudice'. Affidavits are found not 'legally sufficient' on the ground that the specific acts mentioned do not in fact indicate 'bias and prejudice', a reason which emasculates the *Berger* decision by transferring the point of conflict. While lower courts do not assess the truth or falsity of the charge, a similar result is reached by holding that even if the facts stated are true, no 'prejudice' is shown" (ibid.).

"Examples of such evasion," says Mr. Frank, "are numerous" (ibid.), citing *Craven* v. *U. S.*, 22 F. (2) 605 (C. C. A. 1, 1927); *Johnson* v. *U. S.*, 35 F. (2) 355 (W. D. Wash. 1929); *U. S.* v. *Parker*, 23 F. Supp. 880 (D. N. J. 1938). But in particular Mr. Frank criticizes *In re Lisman*, 89 F. (2) 898 (1937), the only reported case prior to this one in which the Court of Appeals for the Second Circuit has had occasion to apply the *Berger* case. A plainer misapplication of the *Berger* case is not found in the books. The Court there watered down allegations in the affidavit of prejudice of most scandalous conduct on the part of the District Court to find "proof only of indiscreet expressions by the District Judge" (89 F. (2) 898, 899), and clearly ignored the *Berger* case by going outside the affidavit for facts to explain away the alleged improprieties. And it is most appropriate to note that the *Lisman* case is the only case other than the *Berger* case cited by the Court of Appeals in its opinion in the instant case.

We respectfully submit that the departure from the principles of the *Berger* case in circuits other than the Second Circuit makes this case an appropriate one in which corrective action is indicated by this Court. For example, in his opinion in the *Berger* case, Mr. Justice McKenna, arguing in support of the very liberal reading he was giving the statute, stated:

> "And in this there is no serious detriment to the administration of justice, nor inconvenience worthy of mention; for of what concern is it to a judge to preside in a particular case? of what concern to other parties to have him so preside?" (255 U. S. 22, 35).

In view of these wise observations in the leading case in this Court, it is indeed startling to find that of the large number of reported cases involving the prejudice statute decided in the 27 years since the *Berger* case, in only one which we have been able to find did the District Court step down in deference to the allegations in the affidavit of prejudice. (*U. S.* v. *Hipsch*, 34 F. Supp. 269 (W. D. Mo.

1940).) (In one other, the District Judge voluntarily stepped aside after finding the affidavit insufficient, *Saunders* v. *Piggly Wiggly Corp.*, 1 F. (2) 582 (W. D. Tenn. 1924).)

Apparently, and despite Mr. Justice McKenna: "Even a judge may not put aside the propensities of human nature as easily as he does his robe" (*Schmidt* v. *U. S.*, 115 F. (2) 394, 398 (C. C. A. 6, 1940)). More than sufficient support for this observation will be found in the opinions in *Boland* v. *U. S.*, 117 F. (2) 958 (C. C. A. 5, 1941); *Benedict* v. *Seiberling*, 17 F. (2) 831 (N. D. Ohio, 1926); *U. S.* v. *Flegenheimer*, 14 F. Supp. 584 (D. N. J., 1935); *U. S.* v. *Parker*, 23 F. Supp. 880 (D. N. J., 1938); *Fieldcrest Dairies, Inc.* v. *City of Chicago*, 27 F. Supp. 258 (N. D. Ill., 1939), and *Sanders* v. *Allen*, 58 F. Supp. 417 (S. D. Cal.). In all of these cases, the spirit as well as the language of this Court's opinion in the *Berger* case is violated by the vehemence with which the respective District Judges assert the superiority of the supposed duty of judges to sit in judgment in particular cases rather than the right of litigants to be given the appearance as well as the substance of justice which is guaranteed to them by the prejudice statute. And the opinion of Manton, C. J., in *American Brake Shoe Co.* v. *Interborough Rapid Transit Co.*, 6 F. Supp. 215 (S. D. N. Y., 1933), striking an affidavit of prejudice, stands as a monument to the degree to which the statute has been vitiated and the mandate of the *Berger* case ignored.

There can be no doubt of the correctness of Mr. Frank's conclusion:

> "An analysis of the cases leads to the conclusion that unless and until the Supreme Court gives new force and effect to the *Berger* decision the disqualification practice of federal district courts will remain sharply limited" (56 Yale Law Journal 605, 630).

B. *The decision of the Court of Appeals is in conflict with the decisions of other Courts of Appeal on the same matter.*

As has been indicated, the Court of Appeals for the Second Circuit is not the only Court of Appeals whose decisions on this issue are in conflict with the *Berger* case. As only one illustration of the confusion and conflict which exists in the application of the *Berger* case, we cite *Morse* v. *Levis,* 54 F. (2) 1027 (C. C. A. 4, 1932). In that case, the plaintiff's affidavit made two allegations to show prejudice: (a) that the District Judge had and had had for many years close social and business relations with the defendants; and (b) that the District Judge had made adverse rulings in a prior suit in which the subject-matter of the litigation had been the same. In sustaining the ruling of the District Judge that the affidavit was insufficient, the Court of Appeals found, as to the first point, that the District Judge in fact had no social or business relations with the defendants, and, as to the second point, that "the utter insufficiency of the charge of prejudice in this respect is the more apparent from the fact that all of the judge's rulings in the first suit were affirmed by this court on appeal" (54 F. (2) 1027, 1031).

The departures from the *Berger* case illustrated by the Court of Appeals for the Second Circuit in the present case (and in the *Lisman* case, supra, p.) and by the Court of Appeals for the Fourth Circuit in the *Morse* case, although illustrative of the virtual disregard of the *Berger* case in the lower federal courts, are by no means universal. The contrary practice, that of conformance with the principles of the *Berger* case, is best illustrated by the decisions of the Courts of Appeal for the Sixth and Eighth Circuits, with which the decision in the present case is in conflict.

In *Schmidt* v. *U. S.,* 115 F. (2) 394 (C. C. A. 6, 1940), the affidavits of prejudice alleged that the District Judge had conferred with the District Attorney while the case against the defendants was being presented to the Grand Jury, that he had given advice and assistance to the District

Attorney, that he had prejudged the case against the defendants, and that he had in effect assumed the role of prosecutor. The District Judge struck the affidavits upon the ground that they were legally insufficient, and his action in so doing was reversed by the Court of Appeals. Although it does not appear from the opinion that the District Judge went outside the affidavits, he must necessarily have done so because the Court of Appeals rested its decision on the ground that, under the *Berger* case, the District Judge could not decide upon the truth or falsity of the affidavits (115 F. (2) 394, 398).

The decisions of the Court of Appeals for the Eighth Circuit are also in conflict with the decision here. In *Nations* v. *U. S.*, 14 F. (2) 507 (C. C. A. 8, 1926), the affidavit of prejudice stated that the defendant had been informed and believed that certain persons connected with the Government had communicated what they alleged to be knowledge of facts or circumstances connected with the charges in the indictment, that as a result the judge had formed an opinion that the defendant was guilty, and that the defendant had been informed and believed that the judge had stated as his opinion and belief that the defendant is guilty. In reversing the refusal of the District Judge to disqualify himself, the Court said:

> "It is true that the time and place of the communication to the judge and the person making it are not stated, and the time and place of the statement made by the judge and the person to whom made, are not stated. But we do not think that the affidavit need be so drawn as to fulfill the technical requirements of an indictment.
>
> "If it was true that some one connected with plaintiff had made a communication to the judge, giving what purported to be the facts in regard to the charges in the indictment, and the judge upon such communication had formed an opinion adverse to defendant, it was not of vital importance who the person was that made the communication, or the time and place of making it. And if it was true that the judge had stated that his opinion was that defendant was guilty of the

conspiracy charged in the indictment, it was not of vital importance to whom the statement was made or the time and place of making it.

"Such details, if set out, might betoken verity in the affidavit if it were subject to attack. The affidavit, however, is not subject to attack, but is to be taken as true. And in any event the judge against whom the affidavit is filed cannot pass upon the truth or falsity of it. Berger v. United States, supra. The affidavit clearly states that defendant has received certain specified, definite information, which defendant believes to be true. If true, it would lead to the reasonable conclusion that the judge had a bias or a prejudice against defendant. Facing a false affidavit stand the penalties of perjury. Facing a false certificate of counsel stands the penalty of disbarment. The affidavit and the certificate are to be taken at their face value" (14 F. (2) 507, 509).

We have quoted at length from the opinion in the *Nations* case in order to emphasize the degree to which the attitude of the Court there differs from the attitude of the Court of Appeals here. Consistent with the *Berger* case, the opinion in the *Nations* case gives the statute a generous interpretation and scope, restricts its consideration sharply to the affidavit itself, and gives greater weight to the affiant's right to impartial justice than to the judge's "right" to sit in a particular case. Similarly illustrative of the practice in the Eighth Circuit is the opinion in *Lewis* v. *U. S.*, 14 F. (2) 389 (1926).

The principles and attitudes applied in the Eighth Circuit, in conformance to the opinion of this Court in the *Berger* case, conflict sharply with those applied in the present case and in the *Lisman* case, and fully warrant the exercise by this Court of its jurisdiction to eliminate conflicts between decisions of the respective Courts of Appeal.

II. The Case Should Be Decided Now

A. *The Case Is Important*

1.) We recognize the preference of the Court generally to withhold certiorari at an intermediate stage of litigation. We submit, however, that the present case demands review at its present stage. As the petition for mandamus recites (R.):

> "The indictments * * * charge the petitioners, in substance, with conspiring to advocate and advocating the overthrow of the Government of the United States by force and violence through the medium of their advocacy of the principles of Marxism-Leninism over a period of three years. The trials appear certain to be prolonged and complex. Petitioners are advised by counsel and believe that, for a proper defense, it will be necessary for them to call witnesses from every part of the United States to testify to innumerable meetings, conferences and discussions at which the defendants, the Communist Party, or any of its representatives, engaged in the teaching of Marxist-Leninist doctrines as applied to the issues of the day from time to time over the period covered by the indictment. Petitioners are further advised by counsel and believe that at the trials in the aforementioned causes it will be necessary to introduce many hundreds of exhibits consisting of books, leaflets, pamphlets, periodicals and other types of publications of the petitioners, the Communist Party, its representatives and others. Both the United States Attorney and counsel for the petitioners are of the view, as petitioners are advised by their counsel and believe, that the trials in the above mentioned causes will take several months.
>
> "The offenses charged in the indictments are of grave importance. They involve questions of the legality of matters of advocacy and belief, raising issues of freedom of speech, thought and assembly, under the First Amendment of the Constitution. They will necessitate prolonged legal argument and extensive

briefs, adding further to the length and complexity of the proceedings.

"Under these circumstances it will impose great and unjust hardship upon the petitioners if they are required now to proceed to a lengthy trial before Judge Medina, for in the event that this Court should later determine that Judge Medina was in fact legally disqualified by reason of personal bias and prejudice against the defendants, a prolonged retrial would become necessary."

These grounds, we believe, warrant review at the present time (28 U. S. C. §1254 (1)). *Spiller* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 253 U. S. 117.

2.) Essentially, the indictment in this case charges petitioners with having committed a political crime—the crime of advocating a change in the existing social order. In the trial of this case, therefore, petitioners will not be defending a charge of "crime"; they will be defending their social and political views, their right to hold them, and their right to advocate them.

In any criminal case, no matter how minor, it is of the essence of justice that the defendant be tried before a judge of absolute impartiality. In a case like this, the impartiality of the judge is in itself a test of the system under which he functions, and any doubt as to his impartiality can only confirm the defendants and others in their view that impartial justice is not available to those who challenge the very foundations of that system.

It is therefore important for this Court to use its power towards the end that any doubt as to the impartiality of the trial judge in this case be resolved in favor of petitioners.

B. *The Issue May Be Res Adjudicata*

It is possible, furthermore, that, should certiorari be denied on the present petition, petitioners, in seeking review in this Court after conviction, should such result eventuate, may encounter the contention that the present decision of the Court of Appeals may render the issue of the District Judge's bias *res adjudicata* or that petitioners may then be estopped from asserting error on the question.

Petitioners do not consider that such contentions, if advanced, are sound. But they do not regard their opinion as so utterly incontrovertible as to warrant their deferring their presentation of the issue of bias to the Court until after a possible conviction.

C. *A Similar Issue Is Now Before This Court*

During the present term, this Court has granted a petition for certiorari in *Eisler* v. *U. S.*, No. 255, in which one of the questions presented is whether the Court of Appeals erred, under the *Berger* case, in sustaining the refusal of Justice Holtzoff to disqualify himself upon the filing of an affidavit of prejudice. The affidavit in the *Eisler* case recited, in substance, "that Justice Holtzoff had, while legal adviser to the FBI, participated in FBI investigations of aliens and Communists, including an investigation of Eisler, who is an alien Communist, and also that Justice Holtzoff had a personal hatred of Communists, as shown by his sponsoring of anti-Communist legislation and his friendship with and admiration of J. Edgar Hoover, who has used highly intemperate language regarding Communists" (Petition for a Writ of Certiorari, p. 5).

Since this Court has granted the petition for certiorari in the *Eisler* case and will therefore soon hear argument and decide the issues therein, including that relating to

the prejudice statute, it is submitted that the ends of justice and the convenience of both parties will be served if the Court also takes jurisdiction in this case.

III. The Necessity for a Stay

According to the N.Y. Times of Jan. 7, 1949 (p. 5) John F.X.McGohey, United States Attorney said that two months was a "conservative estimate" of the duration of the conspiracy trial of petitioners, one of the thirteen cases referred to herein. It was reported that the trial "may last much longer" and that it will be tried by Mr. McGohey and five assistants.

Conclusion

An important statute is here involved in an important case, a statute whose "solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial" (*Berger* v. *U. S.*, 255 U. S. 22, 35-36). The Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court. The decision of the Court of Appeals is in conflict with the decisions of other Courts of Appeal on the same matter. The case is one which calls for decision now. Wherefore, petitioners pray: (1) that a writ of certiorari issue to the Court of Appeals for the Second Circuit to review its judgment and decree; and (2) that this Court stay any further proceedings, particularly the

trials now set for January 17, 1949, pending its determination of this petition.

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